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CASE NO.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

WILLIAM REY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE ALLEN INSTRUCTION SANCTIONED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND GIVEN TO THE JURY IN THE CASE AT BAR OVER DEFENSE OBJECTION UNDULY COERCED THE JURY INTO RENDERING ITS VERDICT AGAINST THE PETITIONER IN THIS CASE WHERE THE ALLEN INSTRUCTION IMMEDIATELY CAUSED THE RESIGNATION OF THE JURY FOREWOMAN, SUBSTITUTION OF ANOTHER FOREPERSON, AND A PROMPT VERDICT OF GUILT AGAINST THE PETITIONER, AND WHETHER THE ALLEN INSTRUCTION AS PRESENTLY UTILIZED IN THE FEDERAL COURTS UNDERMINES CONFIDENCE IN THE JURY'S FACT FINDING FUNCTION, IN VIOLATION OF THE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY AND TO DUE PROCESS OF LAW PURSUANT TO THE SIXTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the petitioner, his family, and the United States of America.

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PROMPT VERDICT OF GUILT
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WILLIAM REY,

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, William Rey,
respectfully prays that a writ of
certiorari issue to review the
judgment, opinion, and order on
rehearing of the United States Court of
Appeals for the Eleventh Circuit,

entered in Case No. 86-5093 on March 9, 1987, and April 29, 1987, which affirmed the judgment of conviction and sentence of the United States District Court for the Southern District of Florida.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the petitioner's judgment of conviction and sentence is reported in United States v. Rey, 811 F.2d 1453 (11th Cir. 1987), rehearing denied, ____ F.2d ____ (11th Cir. 1987). The decision is reproduced in the Appendix, hereinafter "A. ____." A timely Petition for Rehearing and Rehearing En Banc was filed and denied by order of the Eleventh Circuit

entered April 29, 1987. See A.43-45.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. §1254(1). This petition is filed within the authorized time period following the Eleventh Circuit's order on rehearing. See Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

No person shall be... deprived of life, liberty, or property, without due process of law... .

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury of the State

and district wherein the
crime shall have been
committed... .

STATEMENT OF THE CASE

The petitioner, WILLIAM REY, was the appellant in the United States Court of Appeals for the Eleventh Circuit, and the defendant in the United States District Court for the Southern District of Florida. The respondent, UNITED STATES OF AMERICA, was the appellee in the Eleventh Circuit, and the prosecution in the district court. In this petition, petitioner will be referred to as the defendant or by name, and the respondent will be referred to as the government. All emphasis is added unless otherwise indicated.

On September 5, 1984, a grand jury

in the Southern District of Florida returned a three-count indictment charging the defendant, along with three named co-defendants,¹ with (I) conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§841(a)(1), 846; (II) possession with intent to distribute cocaine in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2; and (III) use of a wire communication facility in facilitating the commission of the conspiracy in violation of 21 U.S.C. §§843(b) and 846. (R1:1-3).²

¹ The co-defendants, Francisco Ramos, Angel Ortiz, and Luiz Mora, all pled guilty prior to the defendant's trial.

² The record references in this petition are to the record on appeal which was before the Eleventh Circuit and which has been returned to the clerk of the United States District

Trial by jury was held before the Honorable Alcee L. Hastings, district judge, from November 20, 1985, through November 26, 1985, resulting in a verdict of guilty as charged on all counts. (R1:102). After denying the defendant's timely post-trial motions, the district court, on January 21, 1986, entered its judgment and sentence as follows: as to Counts I and II, charging conspiracy and the substantive offense of possession with intent to distribute cocaine, the defendant was sentenced to six years imprisonment on each count, concurrently with each other; as to Count III, charging use of

2 (continued) Court for the Southern District of Florida. This record is available for transmittal to this Court should the Court so order.

the telephone to facilitate the conspiracy, the defendant was sentenced to four years imprisonment, to run concurrently with Count I. It was further ordered that the defendant serve a special parole term of three years as to Count II. (R2:116).

While the events charged in the indictment in the case at bar commenced on August 24, 1984, agents of the Drug Enforcement Administration (DEA) commenced working with an informant, one Joseph Badalich, on or about May 4, 1984, almost four month's earlier, when Badalich was arrested arising out of a totally unrelated drug investigation. (R4:17). In an effort to "get a walk" for his cooperation in making future cases against other persons, Badalich began negotiating with defendant Rey in

a cocaine transaction in June of 1984. (R4:15; R6:100; R9:18, 19; R11:55; R12:149). During the ensuing three months period, Badalich initiated numerous unrecorded and unmonitored meetings and telephone conversations with the defendant. (R11:36-7; R12:153). It was not until August 24, 1984, that Badalich began recording the telephone conversations he placed to the defendant. (R12:152). Undercover DEA agent Robert McCracken acted as the buyer of large quantities of cocaine in partners with informant Badalich. (R11:20, 26).

According to Agent McCracken, Badalich told him that defendant Rey was a person "who owned a boat and who was engaged in being associated with smugglers of cocaine." (R4:23; R9:19).

Agent McCracken testified at a pretrial hearing on the defendant's motion to dismiss predicated upon use of contingently motivated informants that he needs to know as much as possible about a person he is investigating to see if that person "is worthy of my time." (R7:137-8; R11:45). For this reason, McCracken checked the defendant's name in the NADIS computer which indicated that "a William Rey" was involved in drug trafficking. (R4:23-4; R7:134-5; R11:44). Despite the fact that the computer also listed a case and file number along with the name "William Rey," Agent McCracken did not consult the source of the computer's "little squib," nor did he obtain a print-out of further information which was admittedly

readily available from the computer. (R7:138; R11:44-48). McCracken felt that the computer's initial information was sufficient for him to commence an investigation of the defendant based on the information received from the computer and on what informant Badalich had told him. (R7:136). Thus, McCracken conducted no independent verification of the defendant's purported drug involvement. (R11:49). Agent McCracken later learned, however, and so testified before the jury during the trial, that the NADIS information "had absolutely nothing to do with this man [defendant] that sits in this court today." (R11:45-6). Agent McCracken did not check further as he could have and only later discovered that the "William Rey" mentioned in the computer

was, in point of fact, not the defendant William Rey in the case at bar. (R11:48). McCracken later learned that defendant Rey had no prior arrests or convictions. (R11:49). Other than what informant Badalich told Agent McCracken about the defendant, the DEA had no independent verification that the defendant had ever been involved in narcotics transactions.

Id.

On August 24, 1984, informant Badalich introduced Agent McCracken to the defendant at a Days Inn Motel in Fort Lauderdale, Florida. (R11:22). The substance of the conversation at the motel was that the defendant had sources of supply in Miami for some ten kilograms of cocaine. (R11:23). The defendant would have to go to Miami to

confer with his source before he could know whether they could accomplish the transaction that day. Id. Agent McCracken gave the defendant an undercover telephone number to call in order to advise McCracken of the status of the negotiations with defendant's source. (R11:24). After this meeting, the parties went out to the parking lot where the defendant was shown a briefcase containing \$400,000 in cash.

Id.

The agent left and the defendant subsequently called him at the telephone number provided; this call was not recorded. (R11:25, 37). The defendant advised that it looked good but that they could not do it before 2:00 p.m. They decided to put it off until the following Monday, August 27,

1984. (R11:25-6).

On that day, August 27, McCracken and informant Badalich telephoned the defendant from the Fort Lauderdale DEA office; this call was recorded on government Exhibit 3E. (R11:26). During this call, Badalich informed the defendant that they had to get the deal done by 2:00 p.m.; the defendant replied to Badalich over the telephone, "We have to talk." (R11:37).³ Agent

³ The tape recording of this conversation, government Exhibit 3E, was admitted into evidence and played before the jury. Unfortunately, a cold record cannot reflect either the fervor in the defendant's voice when he told Badalich "We have to talk" or the anger in McCracken's voice when he demanded to know whether the defendant would come through with the cocaine. The jury heard the tape and should this Court desire to hear it, it can be immediately transmitted on order of this Court.

McCracken then got on the telephone and demanded to know whether the defendant was going to produce the cocaine or not; the defendant told Agent McCracken that McCracken and Badalich should come to the defendant's house and advised McCracken not to bring the money with him. (R11:38). This is "not frequently" what happens in drug deals. Id. After this conversation, McCracken and Badalich went to the defendant's house in Miami Beach. (R11:30).

The defendant said he did not have the cocaine with him and they would have to go to see his source, "Francisco," (co-defendant Francisco Ramos), at a perfume factory nearby. (R11:31). In addition, the defendant informed McCracken that the deal was

lowered from ten to eight kilograms.

Id.

After this conversation, the defendant and Badalich drove to Sassy Cosmetics with Agents McCracken and Price following. (R11:32). McCracken went inside while Agent Price remained in the car. Id.

Inside the warehouse, the defendant introduced McCracken to "Francisco" and also to the other co-defendants, Angel Ortiz and Luiz Mora. (R11:33). Ramos then told Agent McCracken that he had not eight, but only two kilograms of cocaine to show him as a sample. Id. At that point, Ortiz reached down and pulled out a paper bag on the table in front of Mora. (R11:34). Francisco Ramos reached in and pulled out a "football"

package and opened it with a penknife exposing a quantity of white powder which appeared to be cocaine. Id. During these events, the defendant never touched the cocaine; he introduced Agent McCracken and Badalich as the buyers and "that was it." (R11:39-40).

Agent McCracken said that he then had to go to his bank in Fort Lauderdale to obtain the money; he expressed his displeasure to the defendant because the defendant had earlier that day advised McCracken that he did not need to have the money. (R11:34). McCracken and informant Badalich then left, purportedly to obtain the purchase money. Id.

Upon his return, Agent McCracken had with him an arrest team. (R11:35).

On entry into the warehouse, the defendant and two co-defendants were arrested and the cocaine was seized. (R11:35-6). Subsequently, agents arrested Francisco Ramos a short distance from the warehouse. (R11:36).

The facts pertaining to the defendant's entrapment defense are as follows:⁴

The defendant, who had no prior arrests (R11:48-9; R12:195), had

⁴ As with the recitation of the facts pertaining to the transaction itself, the entrapment facts are set forth here for this Court's evaluation in light of the Allen issue. While, as observed by the Eleventh Circuit in its decision in the case at bar, see A.17, n.7, the defendant did not raise a sufficiency-entrapment issue on appeal. However, the defendant vigorously presented his entrapment defense to the jury which twice announced its inability to reach a verdict, before receiving the Allen instruction over defense objection.

previously been employed for fourteen years as a property manager for a large real estate family. (R12:187-8). However, in late 1983, this family sold its properties and the defendant became unemployed. (R12:188). The defendant had been out of work for approximately six months (R12:190), when, in mid-July of 1984, his wife and son traveled to New York to visit his wife's mother. (R12:177-8, 190). It was during this time that informant Badalich, who was cooperating with the government in hopes that the sentencing judge in his own case would be lenient with him for his having engaged defendant Rey in a drug transaction (R12:142-149), became "very persistent" and initiated some fifteen to twenty telephone calls to the defendant in an effort to engage

the defendant in a drug transaction. (R12:168, 190). Badalich was aware of the defendant's increasingly bad financial situation. (R12:190). He started offering the defendant all kinds of deals regarding drugs. (R12:190-191). The defendant told Badalich that he had never done anything like that and would never do anything like that. (R12:191). After many visits and telephone calls,⁵ the defendant ultimately agreed to attempt to locate someone who could provide Badalich with cocaine. Id.

⁵ Of the fifteen to twenty telephone calls initiated by Badalich to the defendant over a three-month period, only about six of those calls were recorded on tape. (R11:59; R12:168). The DEA has no idea what transpired during the unmonitored telephone calls. (R11:36-7, 56-7; R12:153).

The defendant contacted Francisco Ramos, who had previously gone out with the defendant's daughter; the defendant knew that Ramos could provide cocaine from what his daughter had told him. (R12:192). Before Badalich persuaded him to do this, it never occurred to the defendant to ever get involved in a narcotics transaction, and he never would have done so. (R12:192, 194-5).

During the unrecorded telephone conversation of August 24, 1984, the defendant told Badalich to forget the cocaine transaction; however, Badalich told the defendant that "we must do it. We must do it this weekend, Bill. We must do it." (R12:193). On August 27, the defendant told Agent McCracken over the telephone not to bring his money for the reason that the defendant did

not want to go through with the drug deal. (R12:193). During this telephone conversation, the defendant invited McCracken and Badalich to his house for lunch for the purpose of the defendant's delivering on a friendly basis his message "that I cannot do it." (R12:194, 205). The defendant was concerned with leaving it on a friendly basis because he was frightened. (R12:194).

During the government's cross-examination of the defendant, and in the presence of the jury, there was an emotional outburst in which the defendant asked the prosecutor why he did not produce any tapes reflecting that he did not want to do any drug deals, and why the prosecutor produced only tapes saying that he would do the

deal. (R12:205-6).

At Sassy Cosmetics, the defendant never produced the cocaine, cut it open or touched it. (R11:39-40). Nor had the defendant been involved in fixing the price for the cocaine. (R11:65).

The defendant's wife testified that the defendant had never been involved in drugs prior to this case. (R12:182). Before her mid-July trip to New York, she and the defendant did not socialize with Badalich and they were not friends. (R12:178). However, after her return from New York, Badalich became "very very insistent around my house, my boat. Everywhere I was, there he was. My husband could not be with me. He would come to the house. Whisper in his ear. Take him away. I had problems with my husband.

I thought he was gay." (R12:179). Badalich would "constantly" call the defendant. Id. On August 27, 1984, the day Badalich and Agent McCracken came to her house, Mrs. Rey heard Agent McCracken using foul language and screaming at the defendant. (R12:181).⁷

The defendant presented character witnesses Allen Chase and Sol Taplin. Chase, a Special Agent with the Criminal Investigation Division of the Internal Revenue Service, has known the

⁷ This corresponds with Agent McCracken's own testimony that, during the August 27 visit to the defendant's home, he was "displeased" with the defendant because the defendant said they could not do the deal at the house. (R12:210-211). However, contrary to Mrs. Rey's testimony, McCracken denied that he yelled at the defendant at his house. (R12:211).

defendant since 1976; Chase and his family socialize with the defendant and his children. (R11:118-19). Chase has spent time in the defendant's Miami Beach home and in his apartment unit on Plantation Key. (R11:119). Agent Chase is trained to conduct financial investigations which involve drugs and the detection of wealth that is not legitimately earned. (R11:120). During the years he has known the defendant, and been in his home, Chase has never seen any indication of the fact that the defendant was ever involved in any occupation other than that which Chase knew the defendant to be involved in. (R11:120). Chase never saw any spending habits of the defendant that were inconsistent with what they should have been. Id.

Mr. Taplin, vice mayor of Bal Harbour, Florida, and a member of its City Commission for twenty-one years, has known the defendant for the past twelve years. (R12:173-4). Taplin knows the defendant's reputation for truth and honesty to be a good one; in addition, the defendant has a reputation as a law-abiding person. (R12:175).

THE JURY'S DELIBERATIONS AND THE ALLEN CHARGE

Both at the conclusion of the government's case (R11:97-8), and at the conclusion of all of the evidence (R12:212), the defendant's motion for judgment of acquittal was denied. The jury retired to deliberate on its verdict at 10:25 a.m. on Friday, November 22, 1985. (R13:295). During

its deliberations, the jury had several questions for the court. The first such question arose at 1:45 p.m., during the first day of deliberations. (R13:296-7). The question inquired as to when Agent McCracken made his computer check into a William Rey. (R13:296). The district judge, with the concurrence of the defense and the government, instructed the jury to rely on its collective memory. Id.

The jury's next question inquired as to what it should do if it could not reach a unanimous verdict; the court asserted, out of the jury's presence, that it would give a modified Allen charge if the jury indicated that it was deadlocked. Defense counsel objected and the court observed that it had not yet decided to give the Allen

charge. At 4:05 p.m. on the first day's deliberations, the court brought the jury in and advised them that they would adjourn until Tuesday, November 26, 1985. (R13:299, 302). Thus, on this day, the jury deliberated for approximately five and one-half hours before adjournment.

At 9:30 a.m. on Tuesday, November 26, 1985, the jury resumed its deliberations. (R14:315). At approximately noon, the jury returned with a question: "We the jury on the case...cannot come up with a unanimous decision. We ask at this time for your decision." Id. The court ruled that it would give the Allen charge and the defense objected. (R14:315-16). Accordingly, the trial judge brought the jury back into the courtroom and

administered the Allen charge. (R14:316-18). See A.31-34 for a verbatim reproduction of the Allen charge administered by the trial judge. The jury returned to continue its deliberations at 12:10 p.m. (R14:318).

At some unspecified time thereafter, the jury returned with its next note advising that the foreperson of the jury, Myriam Zayas, wished to withdraw as foreperson and to allow the jury to choose someone else. (R14:319). The parties agreed that the jury would be instructed that they may select any foreperson from their number. Id.

At 1:45 p.m., the jury returned with its verdict, signed by the new foreperson, Martha Unger. (R14:320; R1:102). The verdict was guilty as

charged on all counts. (R14:320-321). Thus, on the second day of deliberations, the jury deliberated for approximately two and one-half hours before the trial court administered the Allen charge. Between that event and the return of the verdict, one hour and thirty-five minutes elapsed, during which, at a point in time unspecified in the record, the foreperson of the jury requested to resign as foreperson, was given permission to do so, and the jury elected a new foreperson.

On appeal to the Eleventh Circuit, the defendant argued, inter alia, that the giving of the Allen charge "unduly coerced the jury into reaching a verdict, and thereby, violated his

right to due process." (A.19).⁷ Believing itself "bound by precedent," the Eleventh Circuit upheld the trial court's giving of the Allen charge in this case, notwithstanding the court's finding that "[i]f this were a question of first impression, we would find the Allen charge in this case impermissible." (A.29). This was so, the court found, because:

as we see it, the Allen charge interferes with the jurors when they are performing their most important role: determining guilt or innocence in a close case. It unjustifiably increases the risk that an innocent person will be convicted as a result of the juror abandoning his

⁷ References to the Eleventh Circuit's decision, reported at 811 F.2d 1453, will be to the Appendix to this petition. See A.1-42.

honestly-held beliefs.
[Eleventh Circuit's
emphasis]. (A.29-9).

The Eleventh Circuit focused on both the particular instruction given in the case at bar, and the general use of the Allen charge. With regard to the particular instruction given in the case at bar, the court found "particularly improper" that portion of the trial judge's Allen instruction stressing that:

"the trial has been expensive in time effort, money and emotional strain to both the defense and the prosecution... . Obviously, another trial would only serve to increase the cost to both sides." [Eleventh Circuit's emphasis]. (A.22).

The Eleventh Circuit found that the "practical effect" of this instruction is to "discourage jurors in the minority and to pressure them to

abandon their honestly-held beliefs, not in response to considerations regarding the guilt or innocence of the defendant, but in response to the expediency of saving expenses." (A.22-3). By stressing "obviously" and "only," the trial judge "effectively tells the minority that holding out for their position is pointless, because the majority view will prevail on retrial." (A.23).

In addition to its objections to the particular instruction given in the case at bar, the Eleventh Circuit found the Allen instruction in general to be unduly coercive on the minority jurors holding out for acquittal. See A.23-25. The court based this conclusion on the following analysis.

The court quoted two paragraphs

from the Allen charge as follows:

"[I]f a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one, since it appears to make no effective impression upon the minds of the others.

"On the other hand, if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again and most thoughtfully whether you should accept the weight and sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt."
(A.23-4).

The Eleventh Circuit observed that

[b]ecause this instruction asks jurors to discount their views if they are in the minority or in the majority, it virtually guarantees jury confusion. "Such a charge is so difficult to comprehend that...it is 'an invitation to frolic with Alice in Wonderland.'" State v. Nicholson, 315 So.2d 639, 642 (La. 1975)(quoting United

States v. Fioravanti, 412 F.2d 407, 417 (3d Cir.), cert. denied, 396 U.S. 837, 90 S.Ct. 97, 24 L.Ed.2d 88 (1969). [Eleventh Circuit's emphasis]. (A.24).

The Eleventh Circuit found that "[p]ractically, the pressure to change position will fall most heavily on the minority." [Eleventh Circuit's emphasis]. (A.25).

Finally, the Eleventh Circuit observed:

The last thing such a minority holdout juror needs is for the trial judge-cloaked with the full authority of his office-to even hint that holding out will be futile in the long run and that a verdict could be reached if the holdout would just reconsider.

The jury trial system has not malfunctioned when the jury cannot reach a verdict. One of the safeguards against the conviction of innocent persons built into our criminal justice system is

that a jury may not be able to reach a unanimous verdict. Furthermore, a hung jury does not necessarily result in a retrial: one or both parties frequently change their view of the case so that a plea arrangement is reached or charges are dropped. Consequently, there is no necessity for judges to force a verdict. (A.27-8).

However, notwithstanding the Eleventh Circuit's express finding of coercion and its desire to reverse the defendant's conviction in this case, the court declined to do so, in view of the binding precedent of the former Fifth Circuit's decision in United States v. Bailey, 480 F.2d 518 (5th Cir. 1973)(en banc), wherein a majority of the judges on the en banc Fifth Circuit upheld the use of the Allen charge. (A.20-21). Inviting a petition for rehearing en banc, the

panel several times opined that "the time is ripe for reconsideration of the Bailey decision" (A.21), and that "[w]hile we think the full court ought to reconsider Bailey and its progeny, we are, for how at least, overcome by precedent." (A.31).⁸

The Eleventh Circuit observed that in the years since this Court's nineteenth century approval of "an instruction urging the jury to reach a verdict" (A.19) in Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed.2d 528 (1896), the "modern

⁸ Notwithstanding the panel's repeated invitation for the full en banc Eleventh Circuit's reconsideration of Bailey, not one judge of the Eleventh Circuit, including the author of the decision in the case at bar, voted to hear the case on rehearing en banc. See A.43-45.

judicial trend...is against the Allen charge." (A.20). The court noted that in the exercise of their supervisory power, three federal circuit courts have prohibited Allen charges since 1969, four other federal circuit courts have sharply curtailed their use, and at least eighteen states have rejected the Allen charge.⁹ See A.20, and notes 10 through 12. (A.40-41).

In addition, the Eleventh Circuit observed both the criticism of the Allen instruction within the legal community (see A.20 and n.13, A.41),

⁹ To be added to the eighteen states cited by the Eleventh Circuit is New Mexico which has expressly prohibited use of the "shotgun instruction." See State v. McCarter, 93 N.M. 708, 604 P.2d 1242 (1980). See also New Mexico Jury Instructions-Criminal, §14.6030, and "USE NOTE."

and the American Bar Association's recommendation against the use of the Allen charge and proposed guidelines. See A.20 & n.14, A.41.

After setting forth the above "modern judicial trend" against the Allen charge, the Eleventh Circuit observed: "Yet, this circuit condones the Allen charge which has a potential for serious interference with the fact-finding process." (A.26).

It is this decision from which certiorari review is sought. The Eleventh Circuit denied a petition for rehearing and for rehearing en banc on April 29, 1987. (A.43-45)

REASONS FOR GRANTING WRIT

THE ALLEN INSTRUCTION SANCTIONED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND GIVEN TO THE JURY IN THE CASE AT BAR OVER DEFENSE OBJECTION UNDULY COERCED THE JURY INTO RENDERING ITS VERDICT AGAINST THE PETITIONER IN THIS CASE WHERE THE ALLEN INSTRUCTION IMMEDIATELY CAUSED THE RESIGNATION OF THE JURY FOREWOMAN, SUBSTITUTION OF ANOTHER FOREPERSON, AND A PROMPT VERDICT OF GUILT AGAINST THE PETITIONER, AND THE ALLEN INSTRUCTION AS PRESENTLY UTILIZED IN THE FEDERAL COURTS UNDERMINES CONFIDENCE IN THE JURY'S FACT FINDING FUNCTION, IN VIOLATION OF THE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY AND TO DUE PROCESS OF LAW PURSUANT TO THE SIXTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. This case presents a question of great practical and doctrinal importance that has sharply split the federal circuit courts of appeals and the state courts. Despite finding

that the use of the Allen charge increases the risk that an innocent person will be wrongly convicted, the Eleventh Circuit Court of Appeals here holds that its use cannot be error because precedence and precedence alone requires such a result. In sanctioning the use of this instruction, the Eleventh Circuit places itself in conflict with three federal circuit courts of appeals which have abandoned the instruction,¹⁰ four circuit courts of appeals which have severely curtailed its use,¹¹ and nineteen

¹⁰ United States v. Silvern, 484 F.2d 879 (7th Cir. 1973)(en banc); United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971)(en banc); United States v. Fioravanti, 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969).

¹¹ United States v. Blandin, 784 F.2d

states which have rejected the charge.¹²

a. The Allen instruction is an anachronism in modern criminal procedure. It was the product of an age which considered it proper for the court to coerce a jury into arriving at a verdict yet exists today alongside principles intended to insulate the

11 (continued) 1048 (10th Cir. 1986); United States v. Scott, 547 F.2d 334 (6th Cir. 1977); United States v. Stollings, 501 F.2d 954 (4th Cir. 1974); United States v. Angiulo, 485 F.2d 37 (1st Cir. 1973).

12 Fields v. State, 487 P.2d 831 (Alaska 1971); State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959); People v. Gainer, 19 Cal.3d 835, 566 P.2d 997, 139 Cal.Rptr. 861 (1977); Taylor v. People, 176 Colo. 316, 490 P.2d 292 (1971); People v. Prim, 53 Ill.2d 62, 289 N.E.2d 601 (1972), cert. denied, 412 U.S. 918 (1973); State v. Nicholson, 315 So.2d 639 (La. 1975); Kelly v. State, 270 Md. 139, 310 A.2d 538 (1973); People v. Sullivan, 392

jury from any outside influence. In a series of cases beginning with Irwin v. Dowd, 366 U.S. 717 (1961), this Court has reversed convictions where the proceedings were not sufficiently insulated from the prejudicial effects of publicity. See also Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966). In

12 (continued) Mich. 324, 220 N.W.2d 441 (1974); Sharplin v. State, 330 So.2d 591 (Miss. 1976); State v. Randall, 137 Mont. 534, 353 P.2d 1054 (1960); State v. Garza, 185 Neb. 445, 176 N.W.2d 664 (1970); State v. McCarter, 93 N.M. 708, 604 P.2d 1242 (1980); State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978); State v. Czachor, 82 N.J. 392, 413 A.2d 593 (1980); State v. Marsh, 260 Or. 416, 490 P.2d 491 (1971), cert. denied sub nom., O'Dell v. Oregon, 406 U.S. 974 (1972); Commonwealth v. Spencer, 442 Pa. 328, 275 A.2d 299 (1971); State v. Patriarca, 112 R.I. 14, 308 A.2d 300 (1973); State v. Ferguson, 84 S.D. 605, 175 N.W.2d 57 (1970); Kersey v. State, 525 S.W.2d 139 (Tenn. 1975).

Turner v. Louisiana, 379 U.S. 466 (1965), this Court reversed a conviction where the two principal witnesses for the prosecution, deputy sheriffs, had mingled freely with the sequestered jurors during the trial. According to this Court, the close association of the jurors and these witnesses created the possibility that the jurors would be swayed by their personal feelings for these witnesses. Finally, in Jenkins v. United States, 380 U.S. 445 (1965), this Court held that it was impermissibly coercive for a judge to tell a jury that they were required to reach a verdict.

b. The Allen instruction denies the accused his rights to a fair trial and to due process of law. Like the instruction that "[y]ou have got to

reach a decision in this case," Jenkins at 446, the Allen charge brings down upon the jury the authority of the court and tells the jury that the court does not believe that the jurors have worked hard enough to resolve their differences. United States v. Thomas, 449 F.2d at 1182-83. The pressure to reach a verdict is further enhanced by the instruction's interjection of the cost and expense of a retrial, a consideration wholly irrelevant to the question of guilt or innocence. Moreover, the instruction, in all of its various forms, directs itself to the failure of the minority to adequately consider the opinion of the majority, thus increasing the likelihood that an individual juror will surrender conscientiously held

beliefs not because he was convinced that he was wrong but because he could no longer withstand the pressure of the many. *Id.* at 1183; United States v. Anguiulo, 485 F.2d at 39; O'Sullivan, Deadlocked Juries and the Allen Charge, 37 Me.L.Rev. 167, 170 (1985).

c. The Allen charge also denies the accused a fair trial because it is conviction prone. While the government may argue that the Allen charge serves the interests of judicial economy, it is not the instruction's propensity to bring back verdicts which has so endeared itself to the government, it is the instruction's propensity to bring back verdicts of guilty. "The charge is used precisely because it works, because it can blast a verdict out of a jury otherwise unable to agree

that a person is guilty." United States v. Bailey, 468 F.2d 652, 666 (5th Cir. 1972), on rehearing, 480 F.2d 518 (5th Cir. 1973)(en banc).

2. The decision in this case is particularly indefensible because the Eleventh Circuit expressly found a substantial risk that this jury was coerced but felt bound by precedent to affirm. Such a mechanical application of stare decisis can only serve to undermine respect for the judiciary. Moreover, to the extent that a juror or jurors held conscientious reservations about the defendant's guilt, the surrender of those reservations, as a direct consequence of this instruction, increased the risk that an innocent person was convicted, thus calling into question the reliability of the fact

finding process. Such a result runs counter to decisions of the Court intended to enhance the search for truth. See, e.g., Harris v. New York, 401 U.S. 222 (1971); United States v. Leon, 468 U.S. 897 (1984). The Allen charge undermines confidence in the fact finding process no less so than when the jury is deprived of material impeachment evidence, United States v. Bagley, ___ U.S. ___, 105 S.Ct. 3375, 3381 (1985), or when defense counsel renders ineffective assistance, Strickland v. Washington, 466 U.S. 668, 694 (1984). Its coercive effect collides with the Court's "overriding concern with the justice of the finding of guilt." United States v. Agurs, 427 U.S. 97, 112 (1976). Particularly

where instructions to the jury as finders of fact are concerned, the due process clause "must be held to safeguard" the principle "that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of. . .other circumstances not adduced as proof at trial.", Taylor v. Kentucky, 436 U.S. 478, 485 (1978), such as the Allen instruction which the Eleventh Circuit in this case found to be impermissibly coercive and a "serious interference with the fact-finding process." (A.26, 29).

a. The panel found two portions of the charge given herein improper. That portion of the charge which told the jury:

the trial has been expensive in time, effort, money and emotional strain to both the defense and the prosecution... . Obviously, another trial would only serve to increase the costs to both sides. [Eleventh Circuit's emphasis].

functioned to pressure jurors in the minority into abandoning their honestly held beliefs, not in response to considerations of guilt or innocence, but in response to the expediency of saving expenses. In effect this instruction told the jurors that holding out for their position was pointless because the majority view would prevail on retrial. (A.23).

b. That portion of the charge which told the jury:

[I]f a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt

is a reasonable one, since it appears to make no effective impression upon the minds of the others.

On the other hand, if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again and most thoughtfully whether you should accept the weight and sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt.

functioned to instruct the jurors to discount their views if they were in the majority or the minority, guaranteeing jury confusion. (A.24).

Moreover:

This instruction can intimidate individual jurors. After hearing this confusing instruction, a juror will likely remember only that the judge wants them to reach a verdict and that they should reconsider their opinions. Practically, the pressure to change position will fall most heavily on the minority.

[Eleventh Circuit's emphasis]
(A.25).

Id. This unbalanced instruction, it must be noted, totally fails to address the majority that favors conviction; no caution for them to reconsider their view is included.

c. The Eleventh Circuit's opinion clearly indicates its view that, especially "in a close case," the Allen instruction interferes with the jurors when they are performing their most important role, the determination of guilt or innocence. That the court viewed this case as a "close case" is manifest since the Eleventh Circuit, finding itself "overcome by precedent," "would find the Allen charge in this case impermissible." (A.29, 31).

Factually, this case presented the

jury with a strong entrapment defense. The defendant, never before arrested, let alone convicted of any crime (R11:48-9; R12:195), enjoyed an excellent reputation in his community for honesty, good character, and as a law-abiding person. See R11:118-120; R12:173-5. Allen Chase, a Special Agent with the Criminal Investigation Division of the Internal Revenue Service, who had known the defendant for many years and whose family socialized with the defendant and his children, was trained as an IRS agent to conduct financial investigations with a view toward detection of wealth that was not legitimately earned. (R11:118-119). During his years of close association with the defendant, Chase had never observed any indication

that the defendant had ever been involved in drug trafficking. (R11:120).

DEA Agent McCracken, after purportedly learning the defendant's name from the informant involved in this case, ran the name "William Rey" through the NADIS computer and learned that a "William Rey" was involved in drug trafficking; however, McCracken failed to call up from the computer the readily available case and file number given along with the name "William Rey," and did not thereby learn that the "William Rey" mentioned in the computer was not the defendant in the case at bar. (R11:44-48).

The jury also heard of the three month pursuit of the defendant by the government's informant, desperate to

avoid a jail sentence arising out of his own unrelated drug prosecution. (R4:15; R6:100; R9:18, 19; R11:55). The government's informant initiated some fifteen to twenty unrecorded and unmonitored telephone calls to the defendant during the three month period that the informant attempted to involve the defendant in a cocaine transaction. (R11:59; R12:168). The DEA had no idea what transpired during these unmonitored calls. (R11:36-7, 56-7; R12:153).

Aware of the defendant's increasingly bad financial situation, the informant persisted in his efforts to convince the defendant to attempt to locate cocaine for the informant. (R12:190-191). During this period of pursuit, the defendant's wife was so

concerned with the defendant's distraction with the informant that she "thought [defendant] was gay." (R12:179). The jury heard the defendant's fervent statement over the telephone to the informant that "We have to talk" (R11:37), made just prior to the undercover agent's grabbing the telephone and demanding whether the deal would go through. *Id.* The defendant was attempting to extricate himself from the transaction and was fearful of the informant and Agent McCracken. (R12:194).

During the jury's deliberations, the jury inquired as to when Agent McCracken made his computer check into "a William Rey." (R13:296). Subsequently, the jury indicated that it may not be able to reach a unanimous

verdict. (R13:299). During the next day's deliberations, the jury announced its deadlock. (R14:315). Within minutes of the trial judge's administration of the Allen charge over defense objection (R14:315-16), the jury foreperson announced her desire to resign as foreperson and the jury then selected another foreperson. (R14:319). Within minutes of that substitution of forepersons, the jury returned its verdict of guilty. (R14:320).

It is against this factual backdrop that the Eleventh Circuit found that "the Allen charge in this case [was] impermissible." (A.29).

d. The Allen instruction is rooted in the myth of the pigheaded juror, a person so "stubborn or

recalcitrant" that he would "persist in blind adherence to his position" rather than listen to reason; a person more interested in exercising power than in administering justice. United States v. Thomas, 449 F.2d at 1188 (Judge Robb dissenting). There is, however, reason to doubt the existence of such an "unreasonable man." The results of the University of Chicago Jury Study Project indicate that the truly stubborn juror is a rarity, that hung juries almost never occur unless the first ballot reflects a truly substantial division of opinion. Note, Due Process, Judicial Economy, and the Hung Jury: Reexamination of the Allen Charge, 53 Va.L.Rev. 123, 146 (1967):

Moreover, it seems reasonable to argue that the stubborn or unreasonable juror is

precisely the one least likely to yield to the blandishments of the Allen charge. The more likely effect of such an instruction is that the genuinely troubled and conscientious juror or the timid juror who is really not convinced of the guilt of the accused, but who desires to perform his function to the satisfaction of the court, will be overborne by the plea for reconsideration.

Id.

e. We seriously question whether the hung jury constitutes a problem of such magnitude as to justify the risk of a procedure which may well undermine a defendant's right to a unanimous verdict. It has been estimated that only five per cent of criminal jury trials end in a failure to reach a verdict. Note, supra, at 145. Further, those federal circuits which have abandoned the charge have done so

in part because of the perception that it would be cheaper to retry those few cases which would have ended in a hung jury, then continue to consider the inevitable appeals which result from the use of the charge. United States v. Silvern, 484 F.2d 883; United States v. Thomas, 449 F.2d at 1184; United States v. Fioravanti, 407 F.2d at 420. Finally, none of the jurisdictions which have abandoned the charge have found it necessary to bring it back, strong evidence that the courts are not being overwhelmed by a glut of hung juries.

f. To the extent that further instruction is necessary when the jury is deadlocked, the instruction promulgated by the ABA serves that purpose without coercing the jury. See

A.46-48. Five federal circuits and eighteen states have either mandated or recommended the use of the ABA instruction in place of the Allen charge. O'Sullivan, 171-72 & note 35.

g. Like reasonable doubt itself, the hung jury stands as a safeguard to the conviction of the innocent. As Judge Edmondson recognized in his opinion herein, the system has not failed when the jury is unable to reach a verdict. (A.28). A hung jury is simply a necessary implication of the requirement that the verdict be unanimous. Moreover, a hung jury does not necessarily result in a retrial. Often one or both parties change their view of the case so that a plea agreement is reached or charges are dropped. It may even lead to the kind

of investigation which should have occurred in the first place. To the extent that the Allen charge impedes this salutary effect it does a great disservice to the criminal justice system. After 91 years of experience with this instruction, it is time that it be reconsidered.

CONCLUSION

Were the defendant here tried in the District of Columbia Circuit, the Third Circuit, or the Seventh Circuit, this petition would not have been necessary. The panel of the Eleventh Circuit that decided this case believed itself "overcome by precedent" (A.31) despite its view that the Allen charge, sanctioned by this Court since 1896, constitutes a "serious interference with the fact-finding process." (A.27). The live conflict within the federal circuits and between the various states on this constitutional issue is manifest. Certiorari review is essential to resolve this recurring dichotomy of opinion in the nation's courts.

For the reasons stated in this

petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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BY:


MARK KING LEBAN

June 25, 1987



CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

WILLIAM REY,

Petitioner,

versus

UNITED STATES OF AMERICA,

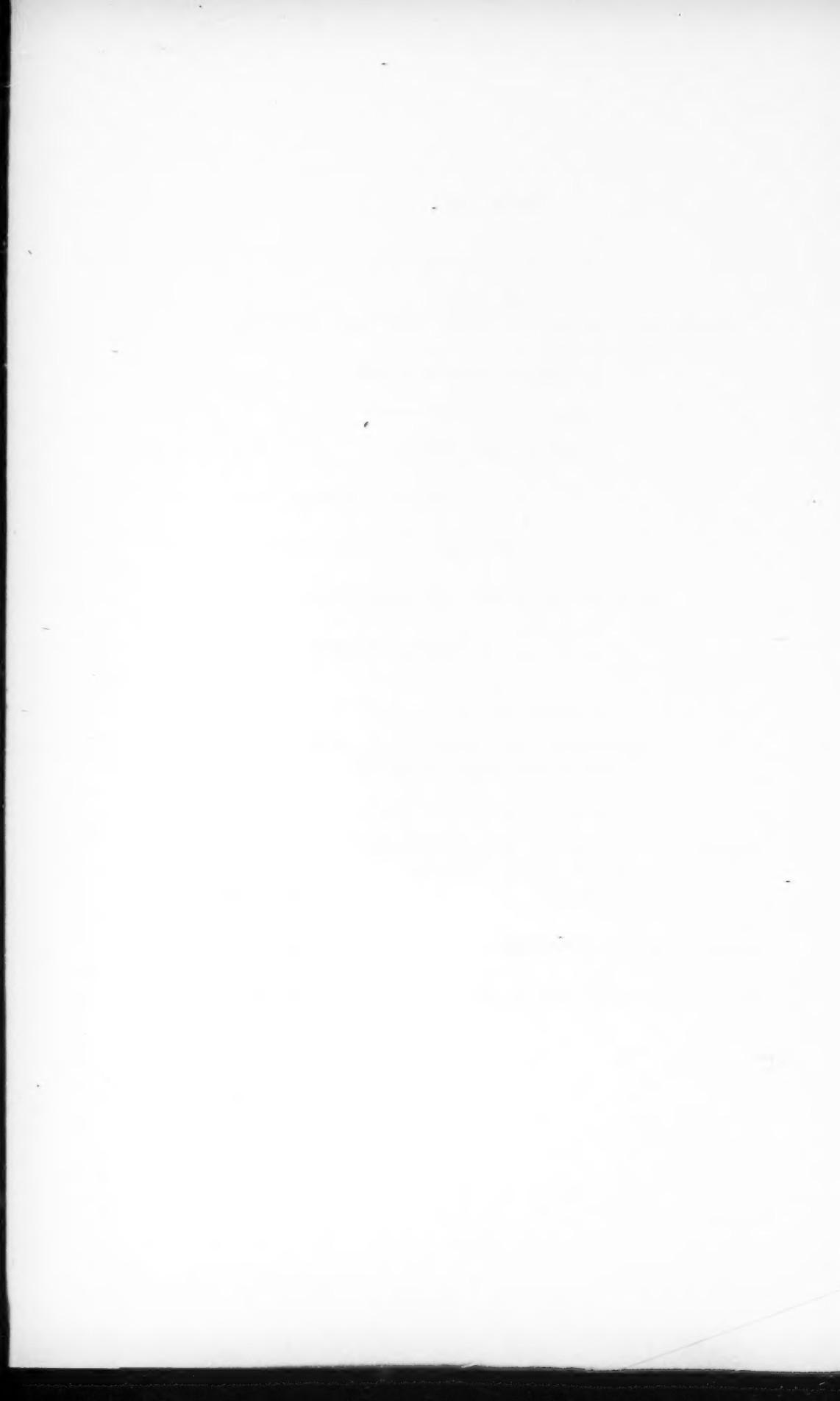
Respondent.

APENDIX TO PETITION FOR
WRIT OF CERTIORARI

UNITED STATES v. WILLIAM REY
811 F.2d 1453 (11th
Cir. 1987)

A.1-42

ORDER ON REHEARING A.43-45
ABA STANDARD 15-4.4 A.46-48



**UNITED STATES OF America,
Plaintiff-Appellee,**

v.

William REY, Defendant-Appellant.

No. 86-5093

**United States Court of Appeals,
Eleventh Circuit.**

March 9, 1987.

Defendant was convicted of conspiracy to possess cocaine with intent to distribute, actual possession of cocaine with intent to distribute, and use of telephone to facilitate commission of cocaine conspiracy, in the United States District Court for the Southern District of Florida, No. 84-6129 CR-ALH, Alcee L. Hastings, J. Defendant appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) Government's use of

contingently motivated informers did not violate due process in drug-related case; agent participated as would-be buyer in cocaine "buy," and defendant, rather than government, called informers as witnesses, and (2) although trial judge's Allen charge to jury, urging jury to reach verdict, tended to coerce jury into reaching verdict, Court was bound by precedent and conviction on drug-related charges would be affirmed.

Affirmed.

1. Criminal Law - 37(5)

Government's use of contingently motivated informers does not create entrapment defense; defendant who was predisposed to commit crime cannot be entrapped, regardless of how outrageous or overreaching government's conduct

may be.

2. Criminal Law - 37(5)

Use of contingently motivated informer is lawful where government does not preselect target of informer's investigation, or where payment is contingent on successful investigation in general or successful investigation of particular crime, rather than successful prosecution of particular individual.

3. Criminal Law - 36.5

Payment of informant's expenses is not improper contingent arrangement.

4. Criminal Law - 36.5

Even where government pays informer to convict particular person, government's conduct is not improper so long as there is some justification for this arrangement.

5. Constitutional Law - 257.5

In rare cases, use of contingently motivated informer might be so outrageous as to violate due process.

U.S.C.A. Const. Amends. 5, 14.

6. Constitutional Law - 257.5

Government's use of contingently motivated informers did not violate due process in drug-related case; agent participated as would-be buyer in cocaine "buy," and defendant, rather than government, called contingently motivated informers as witnesses to testify as part of entrapment defense.

7. Criminal Law - 304(16)

Court may take judicial notice of its own records and records of inferior courts.

8. Criminal Law - 865(1)

Although trial judge's Allen

charge to jury, urging jury to reach verdict, tended to coerce jury into reaching verdict, especially in light of trial judge's stressing of cost of another trial and asking jurors to discount their views, court was bound by precedent and conviction on drug-related charges would be affirmed.

Appeal from the United States
District Court for the Southern
District of Florida.

Before CLARK, EDMONDSON and KEITH*,
Circuit Judges.

EDMONDSON, Circuit Judge:

Appellant William Rey appeals his
conviction for conspiracy to possess

* Honorable Damon J. Keith, U.S.
Circuit Judge for the Sixth Circuit,
sitting by designation.

cocaine with intent to distribute, actual possession of cocaine with intent to distribute, and use of a telephone to facilitate the commission of the cocaine conspiracy. We affirm the judgment of the district court.

I. The Williamson Issue

Rey contends that an undercover agent of the Drug Enforcement Agency, McCracken, selected him as the target of an investigation. Furthermore, Rey alleges that the DEA asked two informants, Badalich and Kulowitch, to participate in the investigation and, pursuant to a plea arrangement, promised them more lenient treatment with respect to criminal charges pending against them in return for their cooperation. According to Rey, the DEA's use of contingently motivated

informants violated his due process rights under the doctrine announced by the former Fifth Circuit in Williamson v. United States, 311 F.2d 441 (5th Cir.1962).¹

The government disputes Rey's factual allegations, claiming that informant Badalich suggested Rey as an investigatory subject. Moreover, the government denies that its agreement with Badalich was contingent on the investigation of Rey. Therefore, the government contends that its conduct did not violate Rey's due process rights under the Williamson doctrine.

The United States magistrate determined that Williamson is still good law in this circuit and recommended that the case against Rey be dismissed "because of a per se and a fortiori

violation of the Williamson rule against contingently motivated informants." The district court rejected this recommendation, ruling that "the issue is one of entrapment and must therefore be decided by a jury."

In Williamson, supra, the government agreed to pay informant Moye an allowance of the ten dollars per diem, plus a two hundred dollars reward if he purchased moonshine whiskey from defendant Williamson leading to Williamson's conviction and a one hundred dollar reward if he made a like purchase from co-defendant Lowrey. 311 F.2d at 442-43; id. at 446 (Cameron, J., dissenting). A divided panel of the former Fifth Circuit reversed Williamson's

conviction, holding that the government's conduct was improper.

Judge Rives held that defendants' convictions must be reversed on the issue of entrapment. Id. at 441.

Judge Rives stated that:

It may possibly be that the Government investigators had such certain knowledge that Williamson and Lowrey were engaged in illicit liquor dealings that they were justified in contracting with Moye on a contingent fee basis, \$200.00 for Williamson and \$100.00 for Lowrey, to produce the legally admissible evidence against each of them. It may be also that the investigators carefully instructed Moye on the rules against entrapment and had it clearly understood that Moye would not induce them to commit a crime, but would simply offer them an opportunity for a sale. None of these facts or circumstances were developed in the evidence....

Without some such justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed. Such an arrangement might tend to a "frame up," or to

cause an informer to induce or persuade innocent person to commit crimes which they had no previous intent or purpose to commit....

Moye's deposition standing alone furnishes prima facie evidence of wrongdoing on the part of the Government investigators in employing Moye on a contingent fee basis. Lacking any contradiction, justification or explanation of such a basis of employment, the convictions of the defendants resulting from Moye's services cannot be sustained.

Id. at 444-45 (emphasis added).

In a special concurrence, Judge Brown held that the case did not involve entrapment. Rather, Judge Brown indicated, the government's conduct violated due process: "the means used to 'make' the case are essentially revolting to an ordered society." Id. at 445. Judge Cameron dissented. Id.

[1] To the extent that Williamson

held that the government's use of contingently-motivated informers creates an entrapment defense, it is no longer good law. The Supreme Court has subsequently held that the entrapment defense focuses on the subjective predisposition of the defendant to commit a crime, rather than on the conduct of the government. Where a defendant is predisposed to commit a crime, he cannot be entrapped, regardless of how outrageous or overreaching the government's conduct may be. Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973).

Indeed, this circuit has held that "Williamson is not an entrapment case

at all, since there was little question that the defendants were predisposed to commit the crimes for which they were convicted." United States v. Walker, 720 F.2d 1527, 1529 (11th Cir.1983), cert. denied, 465 U.S. 1108, 104 S.Ct. 1614, 80 L.Ed.2d 143 (1984); see also United States v. Richardson, 764 F.2d 1514, 1520 n. 1 (11th Cir.1985), cert. denied, ____ U.S. ___, 106 S.Ct. 320, 88 L.Ed.2d 303 (1985). Therefore, the district court in the case sub judice erred by treating the Williamson issue as an entrapment defense.

[2-4] In light of the decisions rendered by this court, whether Williamson has continuing validity in this circuit as a due process doctrine is questionable. Prior to the division of the former Fifth Circuit into the

present Fifth and Eleventh Circuits, the former Fifth Circuit never followed Williamson to reverse a conviction.² Nor has the Eleventh Circuit ever applied Williamson to reverse a conviction. Instead, in more than thirty reported opinions decided subsequent to Williamson involving contingently-motivated informers, the Eleventh Circuit and its predecessor, the former Fifth Circuit, have continually distinguished Williamson and restricted it.³ It is interesting to note that even Judge Brown, the only judge on the original Williamson panel who treated the government's conduct not as entrapment, but as a due process violation, subsequently joined a per curiam opinion affirming Williamson's conviction after retrial on remand.

Williamson v. United States,
(Williamson II), 340 F.2d 612 (5th Cir.), cert. denied, 381 U.S. 950, 85 S.Ct. 1803, 14 L.Ed.2d 724 (1965).

[5] In rare cases, use of a contingently motivated informer might, conceivably, be so outrageous as to violate due process. Cf. United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973); Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1953); United States v. Tobias, 662 F.2d 381, 385-86 (5th Cir. Unit B 1981), cert. denied, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982).⁴ But this does not mean that the Williamson doctrine is good law, i.e., that absent justification or explanation, payment of an informer contingent upon

obtaining the conviction of a specific person in itself violates due process.

[6] We need not decide, as a general proposition, whether Williamson is actually the law in this circuit. Instead, we look to the concrete facts of this case. Agent McCracken participated as the would-be purchaser in the cocaine "buy" in this case. Where "the [drug] buy was not made by the informer, ... but rather by the agent, ... the problem noted in Williamson ... that a contingent fee arrangement might tend to a 'frameup' by an informer is not present." United States v. Jenkins, 480 F.2d 1198, 1199-1120 (5th Cir.), cert. denied, 414 U.S. 913, 94 S.Ct. 256, 38 L.Ed.2d 151 (1973); see also, United States v. McClure, 577 F.2d 1021, 1022-23 (5th

Cir. 1978) (participation of agent in drug buy eliminates possibility that informer fabricated evidence to collect a fee).

Moreover, the government did not call the contingently-motivated informers as witnesses in this case; instead, the informants were called by appellant to testify as part of his entrapment defense. Thus, the potential problem of a contingently-motivated informer being presented by the government as a witness and perjuring his testimony was not present in this case.

[7] In contrast, during Williamson's first trial, the prosecution relied on the informant's testimony as part of the government's case. At the

beginning of the government's case in chief, the government introduced the informant's deposition into evidence and read it to the jury. The informant had died prior to Williamson's first trial. Therefore, in Williamson the potential problem of perjury by a contingently motivated government witness was not only present, but aggravated by the fact that the jury heard the informant's testimony read from a cold deposition and was unable to observe the informant's demeanor when assessing his credibility⁵

Even assuming that Rey's version of the facts is true,⁶ the government's use of contingently-motivated informers in this case did not violate due process. Although Rey may find the use of such informers to be unsavory, their

use certainly did not rise to the level of a constitutional violation.⁷

If Williamson remains, in reality, the law of this circuit, it does not apply to the circumstances of this case.

II. The Allen Charge

The jury deliberated for approximately five and a half hours on Friday, November 22, 1985, and resumed its deliberations at 9:30 a.m. on Tuesday, November 26, 1985. At noon on Tuesday, the, jury informed the judge that it could not reach a unanimous verdict. The judge called the jury into the courtroom and, over defendant's objection, gave the jury a modified Allen instruction.⁸ The jury resumed its deliberation at 12:10 p.m.

Shortly thereafter, the jury

foreperson resigned, with the permission of the court; and the jury selected a new foreperson in her stead. At 1:45 p.m., the jury returned with a verdict of guilty on all three counts.

Rey argues that the giving of the modified Allen charge unduly coerced the jury into reaching a verdict and, thereby, violated his right to due process. Because of the terms, tone and timing of the charge, this panel is seriously concerned by the use of the modified Allen charge in this case.

The instruction of which Rey complains derives its name from Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896), in which the Supreme Court upheld an instruction urging the jury to reach a verdict.⁹ Subsequently, courts adopted many

variations of this jury instruction.

The modern judicial trend, however, is against the Allen charge. In the exercise of their supervisory power, three federal circuit courts have prohibited Allen charges since 1969;¹⁰ and four other federal circuit courts have sharply curtailed their use.¹¹ Moreover, during the last twenty-seven years, at least eighteen states have rejected the Allen charge.¹²

Scholars have sharply criticized the Allen charge because of its coercive impact on juries.¹³ Also, the American Bar Association has recommended against the use of the Allen charge and proposed guidelines for less coercive instructions.¹⁴

In 1973, the former Fifth Circuit considered the propriety of the Allen

charge. United States v. Bailey, 480 F.2d 518 (5th Cir.1973)(en banc). The court split on this issue, with a majority of nine judges upholding use of the Allen charge. Seven judges, however, joined a dissenting opinion advocating prohibition of the Allen charge.

After passage of more than thirteen years, the time is ripe for reconsideration of the Bailey decision. The composition of this court has changed markedly since the Bailey decision. Indeed, only two judges who participated in the Bailey decision remain as active judges in this circuit--and both of these joined the dissenting opinion against the Allen charge. Moreover, the movement in opposition to the Allen charge has

continued to grow since the Bailey decision in 1973: at least five more jurisdictions have rejected the Allen charge.¹⁵

[8] The charge given by the trial judge was virtually identical to the pattern Allen instruction for this circuit. Although it lacked some of the most offensive provisions of other Allen-type charges, it still tended to coerce the jury into reaching a verdict. Two aspects of the instruction seem particularly improper. First, the trial judge stressed that:

the trial as been expensive in time, effort, money and emotional strain to both the defense and the prosecution.... Obviously, another trial would only serve to increase the costs to both sides. (emphasis added).

The practical effect of such an instruction is to discourage jurors in

the minority and to pressure them to abandon their honestly held beliefs, not in response to considerations regarding the guilt or innocence of the defendant, but in response to the expediency of saving expenses. By stating that "obviously" the "only" effect of a new trial would be "to increase ... costs," the judge effectively tells the minority that holding out for their position is pointless, because the majority view will prevail on retrial.

Second, the Allen charge in this case included the following language:

[I]f a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one, since it appears to make no effective impression upon the minds of the others.

On the other hand, if a majority

or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again and most thoughtfully whether you should accept the weight and sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Because this instruction asks jurors to discount their views if they are in the minority or in the majority, it virtually guarantees jury confusion. "Such a charge is so difficult to comprehend that ... it is 'an invitation to frolic with Alice in Wonderland.'"

State v. Nicholson, 315 So.2d 639, 642 (La. 1975)(quoting United States v. Fioravanti, 412 F.2d 407, 417 (3d Cir.), cert. denied, 396 U.S. 837, 90 S.Ct. 97, 24 L.Ed.2d 88 (1969)).

This instruction can intimidate individual jurors. After hearing this confusing instruction, a juror will

likely remember only that the judge wants them to reach a verdict and that they should reconsider their opinions.

Practically, the pressure to change position will fall most heavily on the minority.

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."

Rose v. Clark, ____ U.S. ___, 106 S.Ct. 3101, 3105-06, 92 L.Ed.2d 460 (1986) (quoting United States v. Nobles, 422 U.S. 225, 230, 95 S.Ct. 2160, 2166, 45 L.Ed.2d 141 (1975)). Under the Sixth Amendment, a person charged with a serious federal crime has the right to have the factual question of his guilt or innocence determined by a jury of his peers. See Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d

437 (1970). Where a federal defendant avails himself of this right, he may be convicted only if the jury unanimously finds him guilty. Fed.R.Crim.P. 31(a); Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972); United States v. Smedes, 760 F.2d 109, 111 (6th Cir.1985).

In other contexts, courts have been careful to ensure that the jury performs its crucial fact-finding role free of prejudice, improper influences, and coercion. See, e.g., Isaacs v. Kemp, 778 F.2d 1482 (11th Cir.1985) (pretrial publicity); United States v. Delaney, 732 F.2d 639 (8th Cir.1984) (juror communication with policeman during trial); United States v.

Richardson, 651 F.2d 1251 (8th Cir. 1981)(publicity during trial). Yet, this circuit condones the Allen charge which has a potential for serious interference with the fact-finding process.

In some cases, the duty of a juror is rigorous. Deliberations can be long, hard and heated. It is each juror's duty to stand by his honestly held views; this can require courage and stamina. A majority of jurors eager to go home can exert tremendous pressure on a minority juror who is seriously trying to do his duty. The last thing such a minority holdout juror needs is for the trial judge--cloaked with the full authority of his office--to even hint that holding out will be futile in the long run and that

a verdict could be reached if the holdout would just reconsider.

The jury trial system has not malfunctioned when the jury cannot reach a verdict. One of the safeguards against the conviction of innocent persons built into our criminal justice system is that a jury may not be able to reach a unanimous verdict. Furthermore, a hung jury does not necessarily result in a retrial; one or both parties frequently change their view of the case so that a plea arrangement is reached or charges are dropped. Consequently, there is no necessity for judges to force a verdict.

As we see it, the Allen charges interferes with the jurors when they are performing their most important role: determining guilt or innocence

in a close case. It unjustifiably increases the risk that an innocent person will be convicted as a result of the juror abandoning his honestly-held beliefs.

If this were a question of first impression, we would find the Allen charge in this case impermissible. But we are bound by precedent. Our predecessor, the former Fifth Circuit, gave a general imprimatur to Allen charges in the en banc Bailey decision. This circuit has upheld an Allen charge that employed very similar language. United States v. Alonso, 740 F.2d 862, 876-78 (11th Cir.1984), cert. denied, 469 U.S. 1166, 105 S.Ct. 928, 83 L.Ed.2d 939 (1985). Also, the former Fifth Circuit has upheld Allen charges under circumstances that suggest more coercion

than in the present case. See, e.g., Andrews v. United States, 309 F.2d 127, 129 (5th Cir.1962), cert. denied, 372 U.S. 946, 83 S.Ct. 939, 9 L.Ed.2d 970 (1963)(Allen charge given only 1 hour and 5 minutes after the jury began its deliberations, and jury deliberated for only 25 minutes after hearing the Allen charge before returning verdict).

To distinguish his case from our binding precedents, appellant makes much of the resignation of the jury foreperson. Appellant contends that this demonstrates that the Allen charge had such a severely coercive impact that we can grant him relief notwithstanding our precedents. The fact that the foreperson resigned does not, however, make this case materially different: every time an Allen charge

effectively dynamites a jury, at least one juror changes his mind. The charge is no more coercive because that juror may happen to be the foreperson.

While we think the full court ought to reconsider Bailey and its progeny, we are, for now at least, overcome by precedent. Accordingly, the district court judgment must be AFFIRMED.

APPENDIX

ALLEN CHARGE GIVEN TO THE JURY IN THIS CASE

I'm going to ask you to continue your deliberations in an effort to reach an agreement upon a verdict and dispose of this case.

Now I have a few additional comments at this time that I would like for you to consider as you do so: This is an important case. The trial has been

expensive in time, effort, money and emotional strain to both the defense and the prosecution.

Now, if you should fail to agree upon the verdict, the case will be left open and may have to be tried again.

Obviously, another trial would only serve to increase the costs to both sides. And there's no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you.

Any further jury must be selected in the same manner and from the same source as you were chosen, and there's no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial or more competent to decide

it or have that more or clearer evidence could be produced.

Now, if a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one, since it appears to make no effective impression upon the minds of the others.

On the other hand, if a majority or even a less number of you are in favor of an acquittal, the rest of you should ask yourselves again and most thoughtfully whether you should accept the weight and sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Remember at all times, no juror is expected to give up an honest belief he or she may have as to the weight or

effect of the evidence. But after full deliberation and consideration of the evidence in the case, it's your duty to agree upon a verdict if you can do so.

You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty.

You may be leisurely in your deliberations as the occasion may require and should take all the time which you may feel is necessary.

I'm going to ask you to retire once again and continue your deliberations with these additional comments in mind, to be applied of course in conjunction with all of the other instructions I have previously given you.

FOOTNOTES

1. In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)(en banc), this court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.
2. We recognize that in United States v. Bueno, 447 F.2d 903 (5th Cir.1971), the former Fifth Circuit mentioned Williamson while reversing a criminal conviction on entrapment grounds. The Bueno court reasoned that the government's conduct essentially amounted to

buying heroin from itself, through an intermediary, the defendant, and then charging him with the crime. This greatly exceeds the bounds of reason stated by this court in Williamson v. United States....

Id. at 905 . Bueno was decided solely on entrapment grounds, not due process grounds, and thus does not support Williamson as a due process doctrine. Also, Bueno is distinguishable because the conduct which the court found offensive was the government's furnishing of the drug to the defendant, rather than the government's use of a contingently-motivated informer.

In any event, the Supreme Court specifically disapproved Bueno in United

States v. Russell, 411 U.S. 423, 427-8, 93 S.Ct. 1637, 1641, 36 L.Ed.2d 366 (1973), and overruled it sub silentio in Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976).

3. Due to obvious space limitations, we cannot discuss the facts and rationales of all these decisions. We list a few of the settled limitations on the Williamson doctrine which, in our view, buttress the conclusion that Williamson has been so restricted that nothing may remain of it. Use of a contingently motivated informer is lawful where the government does not preselect the target of the informer's investigation, United States v. Shearer, 794 F.2d 1545, 1549 (11th Cir.1986), or where payment is contingent on a successful investigation in general or successful investigation of a particular crime, rather than the successful prosecution of a particular individual. Owen v. Wainwright, 806 F.2d 1519, 1522 (11th Cir.1986); United States v. Sanchez, 790 F.2d 1561, 1564 (11th Cir.1986); United States v. Valle-Ferrer, 739 F.2d 545, 546-7 (11th Cir.1984). Moreover, payment of an informant's expenses is not an improper contingent arrangement. United States v. Carcaise, 763 F.2d 1328, 1332 (11th Cir.1985). Even where the government pays an informer to convict a particular person, the government's conduct is not improper so long as there is some justification for this arrangement. Hill v. United States, 328 F.2d 988 (5th

Cir.), cert. denied, 379 U.S. 851, 85 S.Ct. 94, 13 L.Ed.2d 54 (1964)(use of contingent arrangement justified where accused had a past record and neighbors had complained to an agent of the accused's activities); Harris v. United States, 400 F.2d 264 (5th Cir.1968) (prior knowledge that defendant is committing the unlawful act justifies use of contingent fee arrangement). For other factors which have justified affirmance of convictions notwithstanding the Williamson doctrine, see Valle-Ferrer, supra, 739 F.2d at 547 (informant's fee and eligibility for reward disclosed to jury); United States v. Beard, 761 F.2d 1477 (11th Cir.), cert. denied, U.S., 106 S.Ct. 239, 88 L.Ed.2d 240 (1985)(testimony by government agent corroborates the informer's testimony); Heard v. United States, 414 F.2d 884, 886-87 (5th Cir. 1969)(corroboration of the informer's testimony).

4. In Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir.1982), the Eleventh Circuit Court of Appeals adopted as precedent all decisions of Unit B of the former Fifth Circuit.

5. The above details concerning the informant's death and the admission of his deposition into evidence at trial do not appear in the published opinions of Williamson I or II. Instead, they may be found in the transcript of Williamson's first trial; that transcript is part of the former Fifth

Circuit's records. A court may take judicial notice of its own records and the records of inferior courts. ITT Rayonier, Inc. v. United States, 651 F.2d 343, 345 n.2 (5th Cir. Unit B 1981). The former Fifth Circuit is the predecessor of the Eleventh Circuit; its records are the Eleventh Circuit's records for purposes of such judicial notice.

6. As noted earlier, the parties dispute certain facts, such as whether the plea arrangement was contingent on an investigation of Rey, and whether the government or the informers initially selected Rey as an investigatory target. Because the district court erroneously held that the Williamson question was an entrapment issue for the jury, it rejected the magistrate's recommendation to dismiss, without accepting or rejecting the limited factual findings on this issue by the magistrate, and without making any independent factual findings on this issue. We need not, however, remand for a resolution of the factual dispute, nor determine the scope of review of the magistrate's factual findings. Assuming, arguendo, that the appellant's version of the facts is correct, the government's conduct in this case did not violate his due process rights.

7. Rey presented an entrapment defense to the jury. In light of the

guilty verdict, the jury obviously did not believe that Rey was entrapped. On appeal, Rey does not contend that the government's conduct entrapped him.

8. For a copy of the Allen instruction in this case, see the Appendix to this Opinion.

9. The Allen Court summarized as follows the instruction it upheld:

in a large portion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for

acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

164 U.S. at 501, 17 S.Ct. at 157.

10. United States v. Silvern, 484 F.2d 879 (7th Cir.1973)(en banc); United States v. Thomas, 449 F.2d 1177 (D.C.Cir.1971)(en banc); United States v. Fioravanti, 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837, 90 S.Ct. 97, 24 L.Ed.2d 88 (1969).

11. United States v. Blandin, 784 F.2d 1048 (10th Cir.1986); United States v. Scott, 547 F.2d 334 (6th Cir.1977); United States v. Stollings, 501 F.2d 954 (4th Cir.1974); United States v. Anguilo, 485 F.2d 37 (1st Cir.1973).

12. Fields v. State, 487 P.2d 831 (Alaska 1971); State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959); People v. Gainer, 19 Cal.3d 835, 566 P.2d 997, 139 Cal.Rptr. 861 (1977); Taylor v. People, 176 Colo. 316, 490 P.2d 292 (1971); People v. Prim, 53 Ill.2d 62, 289 N.E.2d 601 (1972), cert. denied, 412 U.S. 918, 93 S.Ct. 2731, 37 L.Ed.2d 144 (1973); State v. Nicholson, 315 So.2d 639 (La.1975); Kelly v. State, 270 Md. 139, 310 A.2d 538 (1973); People v. Sullivan, 392 Mich. 324, 220 N.W.2d 441 (1974);

Sharplin v. State, 330 So.2d 591 (Miss.1976); State v. Randall, 137 Mont. 534, 353 P.2d 1054 (1960); State v. Garza, 185 Neb. 445, 176 N.W.2d 664 (1970); State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978); State v. Czachor, 82 N.J. 392, 413 A.2d 593 (1980); State v. Marsh, 260 Or. 416, 490 P.2d 491 (1971), cert. denied sub nom., O'Dell v. Oregon, 406 U.S. 974, 92 S.Ct. 2420, 32 L.Ed.2d 674 (1972); Commonwealth v. Spencer, 442 Pa. 328, 275 A.2d 299 (1971); State v. Patriarca, 112 R.I. 14, 308 A.2d 300 (1973); State v. Ferguson, 84 S.D. 605, 175 N.W.2d 57 (1970); Kersey v. State, 525 S.W.2d 139 (Tenn.1975).

13. See, e.g., Sullivan, Deadlocked Juries and the Allen Charge, 37 Me.L.Rev. 167 (1985); Note, The Allen Charge: Recurring Problems and Recent Developments, 47 N.Y.U.L.Rev. 296 (1972); Note, On Instructing Deadlocked Juries, 78 Yale L.J. 100 (1968); Note Due Process, Judicial Economy, and the Hung Jury: A Reexamination of the Allen Charge, 53 Va.L.Rev. 123 (1967).

14. ABA Special Committee on Minimum Standards for the Administration of Criminal Justice, Standards Relating to Trial By Jury, sec. 5.4(b)(Approved Draft, 1968).

15. State v. Czachor, 82 N.J. 392, 413 A.2d 593 (1980); People v. Gainer, 19 Cal.3d 835, 566 P.2d 997, 139 Cal.Rptr.

861 (1977); State v. Nicholson, 315 So.2d 639 (La.1975); Kersey v. Tennessee, 525 S.W.2d 139 (Tenn.1975); State v. Patriarca, 112 R.I. 14, 308 A.2d 300 (1973).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5093

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM REY,

Defendant-Appellant.

Appeal from the United States District
Court for the Southern District
of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion March 9, 1987, 11 Cir., 1983,
F.2d ____).

()

Before CLARK, EDMONDSON and KEITH*,
Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

() The petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit

* Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. L. EDMONDSON
 United States Circuit Judge

ABA Special Committee on Minimum Standards for the Administration of Criminal Justice, Standards Relating to Trial By Jury (Approved Draft, 1968)

Standard 15-4.4. Length of deliberations; deadlocked jury

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must

decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;

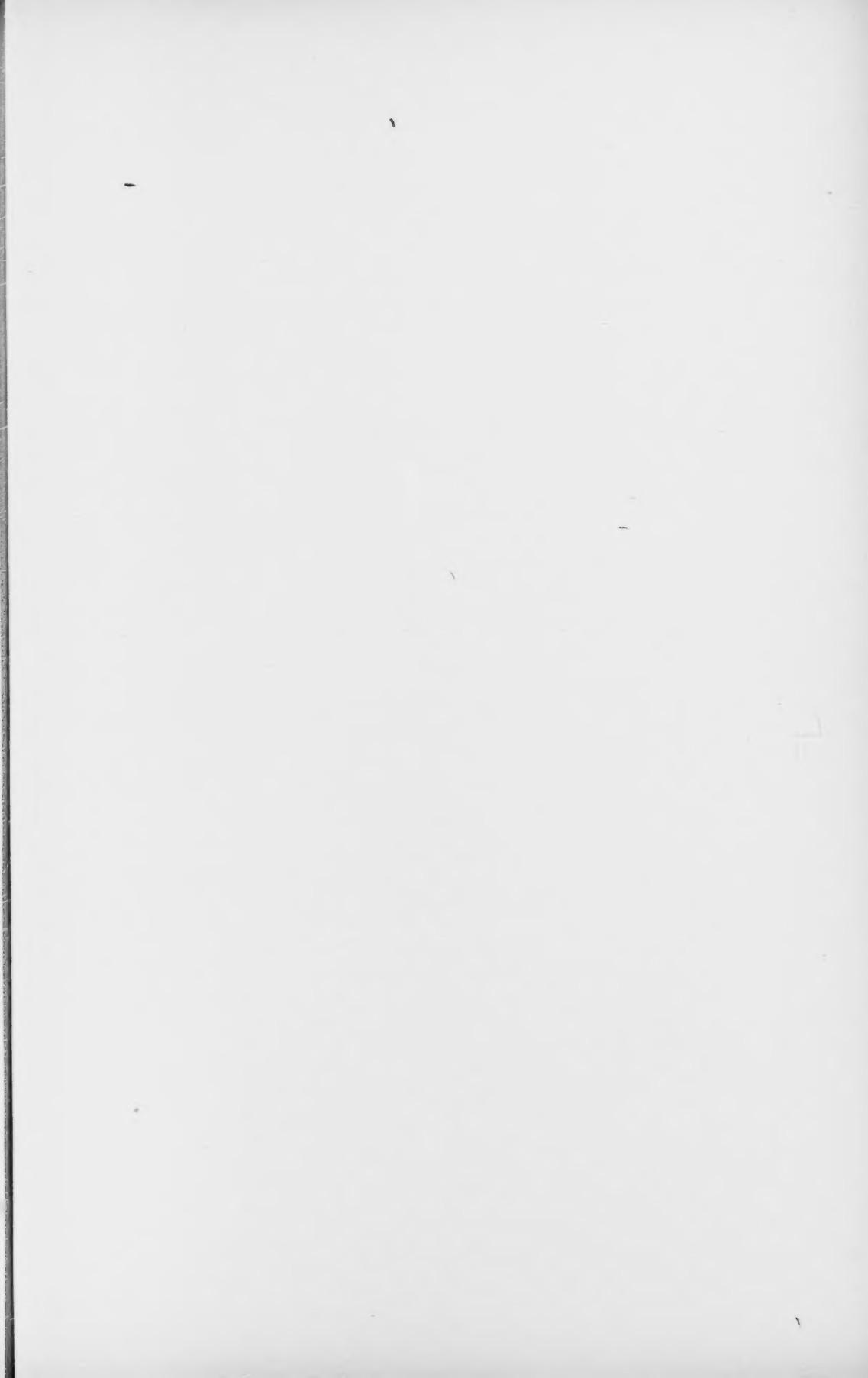
(iv) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and

(v) that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the

jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.



(2) AUG 27 1987

No. 86-2060

JOSEPH E. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM REY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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16 pp

QUESTION PRESENTED

Whether the district court erred by giving a modified
Allen charge to the jury.



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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A42) is reported at 811 F.2d 1453.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1987. A petition for rehearing was denied on April 29, 1987. The petition for a writ of certiorari was filed on June 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and use of a telephone to facilitate a

(1)

cocaine conspiracy, in violation of 21 U.S.C. 843(b). He was sentenced to concurrent terms of six years' imprisonment on the conspiracy and possession counts and four years' imprisonment on the facilitation count. The terms of imprisonment were to be followed by a three-year special parole term. The court of appeals affirmed (Pet. 6-7; Pet. App. A1-A42).

1. The evidence at trial showed that in May 1984 the DEA began investigating petitioner for cocaine trafficking. The investigation began after a DEA informant implicated petitioner in a cocaine smuggling venture. The informant recorded several telephone calls in which petitioner referred to cocaine. On August 24, 1984, a DEA undercover agent posing as a cocaine buyer met with petitioner in Fort Lauderdale, Florida. Petitioner explained that he had access to ten kilograms of cocaine and that his source was in Miami. The agent showed petitioner \$400,000 in cash at that time. Three days later, petitioner advised the agent and the informant that he had eight kilograms of cocaine for sale and that a sample of the drug was located at a nearby perfume factory. The three men went to the perfume factory where petitioner introduced the agent and the informant to his "source," who showed them a package that allegedly contained cocaine. The agent and the informant then left the factory, purportedly to obtain money for the sale. Shortly afterwards, DEA agents arrested petitioner and seized two kilograms of 87 percent pure cocaine. Pet. 7-17.

2. The trial lasted two days. The jury deliberated for five and one-half hours on Friday, November 22, 1985, and resumed its deliberations at 9:30 a.m. on Tuesday, November 26, 1985. At noon on Tuesday, the jury informed the court that it could not reach a unanimous decision. Pet. 25-27; Pet. App. A18. Over objection from defense counsel, the court gave the jury a modified version of the so-called "*Allen charge*" (see *Allen v. United States*,

164 U.S. 492 (1896)). The court instructed the jury as follows (Pet. App. A31-A34):

I'm going to ask you to continue your deliberations in an effort to reach an agreement upon a verdict and dispose of this case.

Now I have a few additional comments at this time that I would like for you to consider as you do so: This is an important case. The trial has been expensive in time, effort, money and emotional strain to both the defense and the prosecution.

Now if you should fail to agree upon the verdict, the case will be left open and may have to be tried again.

Obviously, another trial would only serve to increase the costs to both sides. And there's no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you.

Any further jury must be selected in the same manner and from the same source as you were chosen, and there's no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial or more competent to decide it or that more or clearer evidence could be produced.

Now, if a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one, since it appears to make no effective impression upon the minds of the others.

On the other hand, if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again and most thoughtfully whether you should accept the weight and sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Remember at all times, no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence. But after full deliberation and consideration of the evidence in the case, it's your duty to agree upon a verdict if you can do so.

You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty.

You may be leisurely in your deliberations as the occasion may require and should take all the time which you may feel is necessary.

I'm going to ask you to retire once again and continue your deliberations with these additional comments in mind, to be applied of course in conjunction with all of the other instructions I have previously given to you.

The jury resumed its deliberations at 12:10 p.m. Shortly afterwards, the jury foreperson resigned with the court's permission and a new foreperson was selected. At 1:45 p.m., the jury returned a verdict of guilty on all three counts. Pet. 27-29; Pet. App. A18-A19.

3. The court of appeals affirmed (Pet. App. A1-A42). The court held that the district court did not err by giving the *Allen* charge to the jury, because prior circuit precedent had approved of the use of the charge "under circumstances that suggest more coercion than in the present case" (*id.* at A29-A30). The court also rejected petitioner's argument that the resignation of the foreperson following the *Allen* charge showed that in this case, the instruction had been particularly coercive. The court reasoned that every time an *Allen* charge results in a verdict, it means that at least one juror has changed his mind; the charge "is no more coercive because that juror may happen to be the foreperson" (*id.* at A30-A31).

The court stated that if the issue were one of first impression, it would hold the *Allen* charge given in this case to be impermissible. The court acknowledged that the charge given in this case was "virtually identical" to the pattern *Allen* instruction for the Eleventh Circuit, and that it "lacked some of the most offensive provisions of other *Allen*-type charges" (Pet. App. A22). Nonetheless, the panel stated that in its view the district court's charge "still tended to coerce the jury into reaching a verdict" (*ibid.*). The court concluded, however, that it was bound by prior circuit precedent upholding an *Allen* charge similar to the one given in this case, and it therefore affirmed petitioner's convictions (*id.* at A29-A30).¹

ARGUMENT

Petitioner contends (Pet. 39-61) that the district court erred by giving a modified form of the *Allen* charge to the jury. We submit that the instruction in this case was balanced and did not contain the kind of coercive language that could prejudice a defendant's right to a unanimous verdict from an unbiased jury.

In *Allen v. United States*, 164 U.S. 492, 501-502 (1896), this Court held that it was proper for a district court to give a supplemental instruction to a deadlocked jury encouraging the jurors to be open-minded and to reconsider their views if possible during their deliberations so that a definitive verdict might be reached.² In recent years,

¹ Petitioner sought en banc review of the panel decision, but his petition was denied without attracting a single vote (Pet. App. A43-A45). The panel also held that the government did not violate petitioner's rights under the Due Process Clause by its use of an informant in this case (Pet. App. A16-A18). Petitioner does not challenge that ruling in this Court.

² Since the decision in *Allen*, this Court has several times affirmed convictions that were challenged on the ground that the verdict was coerced by an *Allen* charge. See *Lias v. United States*, 284 U.S. 584,

instructions patterned on the charge in *Allen* have been rejected by some courts. The primary criticism of the *Allen* charge is that it instructs jurors in the minority to reexamine their views, but it does not contain a similar instruction to the jurors who are in the majority. See, e.g., *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971) (“[w]henever a court instructs jurors to reexamine their positions, it should expressly address its remarks to the majority as well as to the minority”); *United States v. Thomas*, 449 F.2d 1177, 1183 (D.C. Cir. 1971) (noting the coercive nature of “statements susceptible to an interpretation reflecting unwholesomely upon minority jurors simply because they happen to be in the minority”); *United States v. Sawyers*, 423 F.2d 1335, 1342 (4th Cir. 1970) (noting that the *Allen* charge would be “better balanced, and fairer, if mention [were] made of the duty of the majority to listen and consider any minority viewpoint, for * * * being in the majority does not necessarily make one right”); *United States v. Fioravanti*, 412 F.2d 407, 417 (3d Cir.), cert. denied, 396 U.S. 837 (1969) (indicating that the “very real treachery of the *Allen Charge*” is that “[i]t contains no admonition that the majority reexamine its position; it cautions only the minority to see the error of its

aff’g 51 F.2d 215, 218 (4th Cir. 1931); *Kawakita v. United States*, 343 U.S. 717, 744 (1952), aff’g 190 F.2d 506, 521-528 (9th Cir. 1951). In *Lias*, the court of appeals had upheld a supplemental charge “substantially” similar to the *Allen* charge (51 F.2d at 218). This Court, on writ of certiorari “limited to the question raised by the supplemental charge to the jury” (284 U.S. 604 (1931)), affirmed the lower court’s judgment per curiam, simply citing the *Allen* decision. In *Kawakita*, the court of appeals had upheld a supplemental charge substantially like the *Allen* instruction (190 F.2d at 521-528). Although the use of the instruction was one of the alleged errors relied on for reversal (see Pet. Br. at 160-169, *Kawakita v. United States*, No. 570 (1951 Term)), this Court disposed of the contention by grouping it with others and saying that all were “either insubstantial or so adequately disposed of by the Court of Appeals that we give them no notice” (343 U.S. at 744).

ways"); *Fields v. State*, 487 P.2d 831, 836 (Alaska 1971) (same); *State v. Thomas*, 86 Ariz. 161, 162-166 342 P.2d 197, 198-201 (1959).

The charge in this case suggested that if a substantial majority of the jurors favored conviction, the minority jurors should reconsider their views. But the charge also stated that even if only a minority of the jurors favored acquittal, the others should reconsider whether they "should accept the weight and sufficiency of the evidence which fails to convince [the other] jurors beyond a reasonable doubt" (Pet. App. A33). Thus, the charge did not contain the much criticized language that only the minority jurors should reexamine their views.³

The charge in this case also did not suffer from a defect commonly attributed to other variations of the *Allen* charge, which have been criticized for placing undue emphasis on the prospect of a retrial and the costs that a retrial would impose on both parties. See *United States v. Silvern*, 484 F.2d 879, 880-881 (7th Cir. 1983) (en banc); *United States v. Thomas*, 449 F.2d at 1183. In this case, the instruction stated only that if the jury did not reach a decision, the case would be left open and *might* have to be tried again; the instruction thus told the jury that a retrial was possible, but not inevitable. See *United States v. Harris*, 391 F.2d 348, 354-357 (6th Cir. 1968). In addition, although the instruction in this case referred to the expenses of the trial and to the costs of a retrial, it did not dwell on those features. Compare *United States v. Angiulo*, 485 F.2d 37, 39 (1st Cir. 1973) (charge made extensive references to expenses of trial); *Peterson v. United States*, 213 F. 920, 924-926 (9th Cir. 1914) (references to

³ For that reason, there is no merit to petitioner's contentions (Pet. 45, 50-51) that the charge was "conviction prone" or that it did not urge the jurors who favored conviction to reexamine their views.

trial expenses were not balanced). See also *United States v. Mason*, 658 F.2d 1263, 1267 (9th Cir. 1981) (overemphasis on fiscal concerns can constitute abuse).

In addition to these features, the instruction given in this case carefully balanced the references to the consequences of a deadlocked jury by stating that the jurors should not feel compelled to surrender their honest convictions merely to reach a verdict. See *United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977); *Berger v. United States*, 62 F.2d 438, 440 (10th Cir. 1932).⁴ In addition, the instruction reminded the jury that it should return a verdict of not guilty if the evidence failed to establish petitioner's guilt beyond a reasonable doubt. In sum, the instruction, viewed as a whole, was not impermissibly coercive. See *United States v. Nichols*, 820 F.2d 508, 511-512 (1st Cir. 1987); *United States v. Kelly*, 783 F.2d 575, 576-577 (5th Cir. 1986), cert. denied, No. 86-5429 (Oct. 14, 1986); *United States v. Boone*, 759 F.2d 345, 348 (4th Cir.), cert. denied, 474 U.S. 861 (1985).

Contrary to petitioner's assertion (Pet. 46), the court of appeals did not find that the jury was actually coerced by the *Allen* charge in this case. The court of appeals' criticism of the charge in this case was based upon its discomfort with the *Allen* charge in general. Moreover, the court specifically rejected petitioner's contention that the resignation of the jury foreperson shortly after the *Allen* charge showed that the charge had a coercive effect.

⁴ Thus, petitioner's reliance (Pet. 43) on *Jenkins v. United States*, 380 U.S. 445 (1965), is misplaced. In that case, after the jury announced itself deadlocked, the trial judge told it, " 'You have got to reach a decision in this case.' " (380 U.S. at 446). This Court held that, in the circumstances of that case, that statement was unduly coercive. Here, by contrast, nothing in the court's instruction compelled the jury to reach a verdict.

The court stated instead that petitioner had shown only that the instruction caused one juror to change his mind. The fact that the jury deliberated for another one and one-half hours after receiving the *Allen* charge—even though the entire trial took only two days—suggests that the charge did not have the coercive effect that petitioner claims. See *United States v. Nichols*, 820 F.2d at 512 (one-hour period between charge and verdict not evidence of coercion); *United States v. Smith*, 635 F.2d 716, 721-722 (8th Cir. 1980) (45-minute period between charge and verdict not indicative of coercion); *United States v. Dawkins*, 562 F.2d 567, 570 (8th Cir. 1977) (same).

To be sure, some courts of appeals have exercised their supervisory powers to reject the traditional *Allen* charge in favor of other, milder formulations advising jurors of their duty to deliberate and to attempt to reach a verdict. See *United States v. Silvern*, *supra*; *United States v. Thomas*; *supra*; *United States v. Fioravanti*, *supra*. Other circuits, such as the court of appeals in this case, have approved variants on the original *Allen* charge. See *United States v. Boone*, 759 F.2d at 348 & n.2; *United States v. Anderton*, 679 F.2d 1199, 1203-1204 (5th Cir. 1982); *United States v. Angiulo*, 485 F.2d 37, 39-40 & n.3 (1st Cir. 1973); Federal Judicial Center, *Pattern Criminal Jury Instructions* 17 (1982); U.S. Fifth Circuit District Judges Association, *Pattern Jury Instructions—Criminal Cases* 168-169 (1978); U.S. Eleventh Circuit District Judges Association, *Pattern Jury Instructions—Criminal Cases* 262-263 (1985); see also *Winters v. United States*, 317 A.2d 530 (D.C. App. 1974) (*en banc*).⁵ Each of these for-

⁵ Still other circuits have not adopted or suggested particular pattern instructions, but evaluate *Allen* charges on a case-by-case basis to determine whether, under all the circumstances, the charge in a particular case was unfairly coercive. See, e.g., *United States v. Blandin*,

mulations is designed to avoid some of the features of the *Allen* charge that have provoked criticism, while still maintaining the effectiveness of the charge by reminding the jurors that they have a duty to reach a verdict if they can do so in good conscience, even if they find the process to be a difficult one.

We submit that there is no compelling reason to have a uniform "duty to deliberate" instruction for all circuits, much less for all state courts. As long as the charge given by the trial court is effective without being unfairly coercive, the decision of different circuits to require the district courts under their supervision to use different language in their "duty to deliberate" charges is not one that requires this Court's intervention. There are a variety of formulations that can remind jurors of their duty to deliberate, while at the same time not unfairly coercing a verdict. Variety in the way that concept is conveyed—like variety in other jury instructions, such as the instructions on reasonable doubt—has been accepted practice in the federal system for years. See Federal Judicial Center, *Pattern Criminal Jury Instructions* 28-29 (1982). Unless and until this Court chooses in effect to promulgate pattern jury instructions for the district courts throughout the nation, some variation among instructions such as the "duty to deliberate" or "*Allen* charge" is inevitable.

Although we do not believe that the differing views among the circuits justify review in this case, there has been another recent development that may affect the disposition of this case. This Court recently granted review in *Lowenfield v. Phelps*, cert. granted, No. 86-6867 (June 22, 1987). One of the issues in that case is whether, during the sentencing phase in a capital case, the trial court erred by giving an *Allen* charge after several jurors announced

784 F.2d 1048 (10th Cir. 1986); *United States v. Hollister*, 746 F.2d 420, 424-425 (8th Cir. 1984); *United States v. Armstrong*, 654 F.2d 1328, 1334 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982).

their view that further deliberations would not be helpful. To be sure, this case is distinguishable from *Lowenfield* on several grounds. First, this is not a capital case. Thus, the Eighth Amendment considerations that underlie the analysis of capital cases are not present in this case. Second, unlike in *Lowenfield*, the district court in this case did not inquire into the numerical division of the jury prior to giving the *Allen* charge to the jury. Compare *Brasfield v. United States*, 272 U.S. 448 (1926). Third, the *Allen* charge in *Lowenfield* was delivered during the penalty phase of the case, not during the guilt phase, and a failure on the jury's part to agree on a sentence in *Lowenfield* would not have required a retrial. Nonetheless, the petitioner in *Lowenfield* has made a broad attack on the *Allen* charge that would transcend the specific circumstances of that case. It is therefore possible that the Court's analysis in *Lowenfield* could affect the issues presented in this case and in all cases in which an *Allen* charge is given. For that reason, this Court may wish to hold this case until *Lowenfield* is decided, after which the Court can dispose of this case in light of the Court's decision there.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Lowenfield v. Phelps*, No. 86-6867, and disposed of in light of the decision in that case.

Respectfully submitted.

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AUGUST 1987

FILED

SEP. 23 1987

JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 86-2060 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

WILLIAM REY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

WHETHER THE ALLEN INSTRUCTION SANCTIONED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND GIVEN TO THE JURY IN THE CASE AT BAR OVER DEFENSE OBJECTION UNDULY COERCED THE JURY INTO RENDERING ITS VERDICT AGAINST THE PETITIONER IN THIS CASE WHERE THE ALLEN INSTRUCTION IMMEDIATELY CAUSED THE RESIGNATION OF THE JURY FOREWOMAN, SUBSTITUTION OF ANOTHER FOREPERSON, AND A PROMPT VERDICT OF GUILT AGAINST THE PETITIONER, AND WHETHER THE ALLEN INSTRUCTION AS PRESENTLY UTILIZED IN THE FEDERAL COURTS UNDERMINES CONFIDENCE IN THE JURY'S FACT FINDING FUNCTION, IN VIOLATION OF THE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY AND TO DUE PROCESS OF LAW PURSUANT TO THE SIXTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?



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ARGUMENT

1. The government's reliance on lower court decisions is flawed precisely because in each of the decisions cited, the court was forced to begin its analysis from the position that the Allen instruction was constitutional. It is that very assumption which we seek to have reconsidered. If a single juror was caused to change his or her verdict for any reason other than a belief in the defendant's guilt and if that change was caused by the Allen instruction given in this case, that instruction was coercive, period.

2. The government seeks to trivialize the instruction at bar by characterizing it as merely a species of "duty to deliberate" instructions.

The government argues that unless this Court chooses to promulgate pattern instructions, variations such as the one at bar will occur. This argument assumes that we are contesting the validity of "duty to deliberate" instructions in general. In fact, had the court below given the instruction that was given in United States v. Nichols, 820 F.2d 508, 511-512 (1st Cir. 1987), cited by the government, we would not be before this Court now.

In the instant case, the jury was told that the trial had been expensive in time, effort, and money to both sides, that in the event of a hung jury the case might have to be tried again, and that retrial would be costly to both sides. (A.32). The jurors were also labeled as being either in the

majority or the minority and, despite the government's parsing of the district court's words, most likely understood that it was the minority that was expected to reconsider its views.

In Nichols, by contrast, there was no mention of the need for a retrial or the expense to either side; nor were jurors in the majority singled out. The court merely asked those "favoring acquittal" and those "for conviction" to reconsider their positions. This was further emphasized when the court told the jurors that they should reconsider their view regardless of whether they were in the majority or the minority. Finally, the jurors were told that they had a right not to

agree.¹, ² 820 F.2d at 511.

As the discussion above makes clear, not all "duty to deliberate" instructions are equal. Some, as in Nichols properly focus a jury's attention on the importance of considering the views of fellow jurors. Others, like the one at bar, pressure the jury into arriving at a verdict based on considerations wholly irrelevant to the determination of the defendant's guilt or innocence. Fundamentally, the reason why the

¹ The lack of coercion was also demonstrated by the jury's verdict in that case, finding some of the defendants guilty on some counts but acquitting on others. Id. at 510.

² So balanced was the Nichols instruction, that one of the defense attorneys "withdrew his objection after the charge was given. . .". 820 F.2d at 512 n.3.

government's argument is so unvailing is that the instruction given herein did suffer from many of the infirmities noted in other cases and recognized by the government as being "unfairly" coercive.

3. The government misreads the instruction given herein in an attempt to show that it did not suffer from the faults condemned by courts and commentators.

a. According to the government, the instruction did not place undue emphasis on the prospect of a retrial since it only told the jury that the case "might" have to be retried again. The government further asserts that the instruction did not "dwell" on the expense of the instant prosecution or on the cost that a retrial would impose

on the parties.

A cursory reading of the actual instruction disposes of these contentions. See A.31-37. The second sentence of the second paragraph told the jury that:

The trial has been expensive in time, effort, money and emotional strain to both the defense and the prosecution.
(A.31-32).

The jury was then told in the third paragraph:

Now if you should fail to agree upon a verdict, the case will be left open and may have to be tried again.
(A.32).

In the first sentence of the fourth paragraph the jury was told:

Obviously, another trial would only serve to increase the costs to both sides.
(A.32).

Finally, in the second sentence of the

fourth paragraph and in the entirety of the fifth paragraph the jury was informed of the effort that would go into picking a new jury and they were assured that the effort would not produce a better jury or clearer evidence. (A.32).

Plainly, these four paragraphs told the jury that if they could not reach a verdict they were not doing their job and that those persons holding up the process were causing great inconvenience and expense to others. Of course, none of this had anything to do with the guilt or innocence of the defendant.

b. The government also asserts that the instruction was balanced, telling both jurors in the majority and the minority that they should

reconsider their views. Again, this is an interpretation which is belied by the instruction itself. What the court actually said was, "if a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one. . ." and "if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again and most thoughtfully whether you should accept the weight and sufficiency of the evidence which fails to convince your fellow jurors. . .". (A.33).³

The government would have this

³ Contrary to the assertion found in the government's response, the instruction did not say that "if only a minority of the jurors favored acquittal, the others should

Court believe that a juror hearing this instruction would go back to the jury room and reconsider his or her views regardless of whether he or she was in the majority, regardless of whether the majority was in favor of conviction, and regardless of how large that majority was. This contention is nonsense. Any juror listening to this instruction would conclude that only if a majority of jurors favored acquittal would those favoring conviction need to

3 (continued) reconsider." (Response, p.7). Those favoring conviction were only asked to reconsider their views if "a majority or even a lesser number of you" were in favor of acquittal. Fundamentally, what should have been said was that if a substantial majority were in favor of conviction, they should nevertheless reconsider their views in light of the minority. Even the government does not contend that the instruction would lend itself to that interpretation.

reconsider their views and that if a majority, particularly a substantial majority, favored conviction, the majority would not need to reconsider their views in light of the one or two dissenters.

If, as was likely the situation in this case, only one or two jurors were holding out for acquittal, this instruction told the jury that it was these dissenters who should reconsider their views. As the Eleventh Circuit recognized, regardless of the specific wording of the charge, "[p]ractically, the pressure to change position will fall most heavily on the minority." (A.256). (Eleventh Circuit's emphasis). That was no less true in this case.

4. Contrary to the assertion

contained in the government's brief, the Eleventh Circuit did hold that the jury was coerced by the Allen charge given herein. The court did not merely say that if the issue were one of first impression it would hold that the Allen charge given in this case was impermissible. (A.29). Referring to that portion of the instruction dealing with the expense of the trial, the court stated:

The practical effect of such an instruction is to discourage jurors in the minority and to pressure them to abandon their honestly held beliefs, not in response to considerations regarding the guilt or innocence of the defendant, but in response to the expediency of saving expenses. (A.23).

Referring to that portion of the instruction which told jurors in the minority to reconsider their views if

there was a substantial majority in favor of conviction, the court said, "Practically, the pressure to change position will fall most heavily on the minority." (A.25). (Eleventh Circuit's emphasis).

If the court did not believe that the jury had been coerced by the charge, there would have been absolutely no reason to make these statements. Plainly, the Eleventh Circuit upheld the conviction herein, not because of any real confidence in the reliability of the fact finding process, but because it was bound by Allen and Allen's progeny.

5. As the government has pointed out, the legitimacy of the Allen charge in the context of the penalty phase of a capital case is before this Court in

Lowenfield v. Phelps, No. 86-6867.

While noting the various procedural distinctions between that case and the one at bar, the government nevertheless invites this Court to hold the instant case for disposition in light of Lowenfield. The instruction in Lowenfield, however, is a true "duty to deliberate" charge and is as mild if not milder than the instruction recommended by the American Bar Association. Thus, what the government would have this Court do is decide the legitimacy of the truly coercive instruction given here in light of this Court's disposition of an instruction which may not be coercive at all.

If this Court is to reconsider the legitimacy of the Allen charge it should do so in a case that presents a

true Allen instruction and in the kind of situation that happens every day in this country. Given the growing conflict among the state courts and the split in the federal circuits, this Court should accept review in this case so as to afford the petitioner here an opportunity to brief the distinctive issues raised herein. Lowenfield and the case at bar present the Court with an opportunity to determine the constitutional validity of such instructions in companion cases, the former in the penalty phase of a state capital case (albeit on federal habeas) and the latter in a non-capital federal case.

CONCLUSION

For these reasons, as well as those set forth in petitioner's initial petition, this Court should grant certiorari and reconsider the constitutionality of the Allen instruction.

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September 22, 1987